FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 7, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2002-299-M
	:	WEST 2002-300-M
CDG MATERIALS, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 11, 2002, the Commission received from CDG Materials, Inc. ("CDG") a request to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On or approximately October 24, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to CDG two proposed penalty assessments totaling $9,550 for 14 citations that it issued to CDG on March 2 and 5, 2001. In its motion, CDG contends that it timely submitted a request for a hearing on these proposed assessments to MSHA, but on March 6, 2002, was notified by MSHA's Civil Penalty Compliance Office that its hearing request was denied because it was untimely. Mot. It maintains that "due to recent current events the efficiency of the U.S. Postal Service may have been compromised during and around the time frame" for filing its request. *Id.* CDG asserts that it "has valid points pertaining to this case" and requests that the Commission reopen the proposed assessments so that it may proceed to a hearing on the merits. *Id.* CDG did not attach any documents to its request.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.,* 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of CDG's position. Other than CDG's assertions, the record contains no information regarding whether CDG submitted a request for a hearing, and if it did, when it was sent by CDG and whether and when it was received by MSHA. Nor is it clear which proposed penalties CDG intended to contest. Accordingly, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Kerr Enterprises, Inc.*, 24 FMSHRC 1, 2 (Jan. 2002) (remanding to judge where pro se operator offered no explanation for failure to timely file request for hearing); *BR&D Enterprises*, 22 FMSHRC 479, 480-81 (Apr. 2000) (remanding to judge where operator alleged that it timely filed a hearing request by certified mail, but never received return receipt); *H & D Coal Co.*, 23 FMSHRC 382, 383 (Apr. 2001) (remanding to judge where operator allegedly mailed hearing request, but MSHA did not receive it). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant CDG's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and that the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). In addition, the timing of MSHA's delivery of the proposed assessments and the deadline for CDG to file hearing requests fell shortly after the events of September 11, 2001, a time during which the U.S. mails were severely disrupted. Under these circumstances, and because no other circumstances exist that would render a grant of relief here problematic, I fail to see the need or utility for remanding this matter. I therefore dissent.

Theodore F. Verheggen, Chairman

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